

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THOMAS MALGESINI,
Plaintiff,
v.
GREGORY MALLEY,
Defendant.

Case No. [5:20-cv-07002-EJD](#)

**ORDER GRANTING PLAINTIFF'S
MOTION FOR REMAND**

Re: Dkt. No. 15

Plaintiff Thomas Malgesini moves to remand this action to Santa Clara County Superior Court and for costs and expenses, including attorney's fees, for improper removal. Mot. to Remand, Dkt. No. 15. Defendant Gregory Malley opposes the motion. Also before the Court are Defendant Malley's motion to dismiss, Dkt. No. 8, and motion to strike, Dkt. No. 14. Pursuant to Civil Local Rule 7-1(b), this Court finds these motions suitable for consideration without oral argument. Having considered the submissions of the parties, the relevant law, and the record in this case, the Court **GRANTS** Plaintiff Malgesini's motion to remand and **DENIES** as moot Defendant Malley's motions to dismiss and strike.

I. BACKGROUND

The parties are part of a separate and related federal action initiated by Defendant Malley. In March 2020, Defendant Malley filed a suit against San Jose Midtown Development LLC ("SJMD") and its members, including Plaintiff Malgesini, alleging fifteen causes of action and entitlement to a monetary distribution from SJMD. *See Malley v. San Jose Midtown Development LLC et al*, Case No. 5:20-cv-01925-EJD ("*Malley Action*"). The sole basis for federal court

Case No.: [5:20-cv-07002-EJD](#)
ORDER GRANTING PLAINTIFF'S MOTION TO REMAND AND REQUEST FOR
ATTORNEY'S FEES

subject matter jurisdiction in Defendant Malley’s case was two claims brought under the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”). On July 20, 2020, defendants in the *Malley Action* filed a motion to dismiss Defendant Malley’s RICO claims. The Court granted the defendants’ motion to dismiss. *See Malley Action*, Dkt. No 52 (“Dismissal Order”). The Dismissal Order specifically addressed the deficiencies of Defendant Malley’s RICO claims but afforded him the opportunity to amend his complaint by October 23, 2020. *Id.* at 12.

While the defendants’ motion to dismiss was pending in the *Malley Action*, Plaintiff Malgesini filed his complaint against Defendant Malley in Santa Clara County Superior Court on August 13, 2020. *See* Notice of Removal, Dkt. No. 1. Plaintiff Malgesini is alleging a breach of a written agreement in the amount \$250,000 made by Defendant Malley. *See* Notice of Removal, Ex. A. On October 7, 2020, Defendant Malley filed his Notice of Removal claiming that the action was removable to this Court pursuant to 28 U.S.C. § 1367(a), “for it constitutes a *de facto*, compulsory counterclaim” to the *Malley Action*. Following removal, the Court related this action, pursuant to Civil Local Rule 3-12, to the *Malley Action*. *See* Order Relating Case, Dkt. No. 9.

II. LEGAL STANDARD

A defendant may remove a civil action filed in state court to federal district court so long as the district court could have exercised original jurisdiction over the matter. 28 U.S.C. § 1441(a). Title 28 U.S.C. § 1447(c) provides that if, at any time before judgment, it appears that the district court lacks subject matter jurisdiction over a case previously removed from state court, the case must be remanded. On a motion to remand, the scope of the removal statute must be strictly construed. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). “The ‘strong presumption’ against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper.” *Id.* Courts should resolve doubts as to removability in favor of remanding the case to state court. *Id.*

III. DISCUSSION

Defendant Malley does not dispute that this action is not subject to the Court’s federal

Case No.: [5:20-cv-07002-EJD](#)

ORDER GRANTING PLAINTIFF’S MOTION TO REMAND AND REQUEST FOR ATTORNEY’S FEES

question or diversity jurisdiction. Instead, he asserts that the Court has original jurisdiction under 28 U.S.C. § 1367(a). Notice of Removal ¶ 7. This statute provides that, subject to some exceptions, “in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). Section 1367(a) does not, however, provide the Court with original jurisdiction over an action and, thus, removal pursuant to it is improper.

This issue is not subject to reasonable dispute. In *Patel v. Del Taco, Inc.*, the Ninth Circuit stated that § 1367, “which provides for supplemental jurisdiction, is not a basis for removal” and that the appellant’s argument to the contrary was “frivolous.” 446 F.3d 996, 999 (9th Cir. 2006). The court thereby affirmed the district court’s award of attorney’s fees to the appellee that had sought remand, concluding that there was “no objectively reasonable basis for removal.” *Id.*

Moreover, on April 8, 2021, the Court declined to exercise supplemental jurisdiction over the state law claims in the *Malley Action* after Defendant Malley failed to adequately amend his federal RICO claims. *See Malley Action*, Dkt. No. 76 at 14-15. The Court ultimately dismissed Defendant Malley’s remaining state law claims without prejudice and instructed the Clerk of the Court to close the *Malley Action* and entered judgment in favor of the defendants. *See Malley Action*, Dkt. No. 77. Thus, the Court lacks subject matter jurisdiction over this action for this reason as well.

In addition to remand, Plaintiff Malgesini requests reimbursement of costs and expenses incurred as a result of removal. Under 28 U.S.C. § 1447(c), “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” Absent unusual circumstances, attorney’s fees should not be awarded when the removing party has an objectively reasonable basis for removal. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005); *Patel*, 446 F.3d at 999.

Case No.: [5:20-cv-07002-EJD](#)

ORDER GRANTING PLAINTIFF’S MOTION TO REMAND AND REQUEST FOR ATTORNEY’S FEES


At the time of removal, Defendant Malley knew or should have known that the removal statute is strictly construed and that a court must reject federal jurisdiction if there is any doubt as to whether removal was proper. *See, e.g., Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006); *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996). At the very least, an objectively reasonable attorney would have realized that the propriety of removal was doubtful and that such doubt would result in a remand. Thus, there was not an objectively reasonable basis for removal and reimbursement is warranted. Accordingly, if Plaintiff Malgesini wishes to pursue reimbursement, he is directed to file such a request within fourteen days of the entry of this order, in accordance with the provisions of Civil Local Rule 54.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiff Malgesini's motion to remand. Accordingly, the Court **REMANDS** this case to the Santa Clara County Superior Court and **DENIES** as moot Defendant Malley's motions to dismiss and to strike. The Clerk of the Court shall close the file.

IT IS SO ORDERED.

Dated: April 8, 2021


 EDWARD J. DAVILA
 United States District Judge

Case No.: [5:20-cv-07002-EJD](#)

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND AND REQUEST FOR ATTORNEY'S FEES